No. 5902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNDA MUNOZ, by O. A. Ellis (her attorney in fact),

Appellant,

vs.

AUBURN LUMBER COMPANY (a corporation), and W. N. TEN EYCK, Receiver of Christmas Hill Mining Company (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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STATEMENT OF THE CASE.

In her statement of the case appellant has set forth with substantial correctness the nature of her action in the District Court, and has then throughout her brief stated from off the record, or from allegations in the complaint and affidavits filed by her, many alleged facts that are supposed to be the basis of her action in the court below.

For the convenience of this court, although it gives an appearance of substance to this appeal that is not deserved, appellees will attempt to state the facts as presented by the record herein. No attempt will be

made to go outside the record in order to contradict alleged facts that plaintiff and appellant has gone outside the record to set forth in her brief.

This appeal is taken under the assignment of error that plaintiff had no adequate remedy at law, and that the restraining order was set aside without defendants giving plaintiff notice that they would seek a termination of said order.

THE RECORD IN THE DISTRICT COURT.

The record upon which the decision was made consisted of plaintiff's complaint and the affidavit for plaintiff and defendants, respectively, that are set out in the transcript of record. There is a direct conflict of evidence in the record, the preponderance, it is submitted, being contrary to the claims of appellant.

In regard to title to the equipment claimed by plaintiff, the affidavit of R. A. Murray (Tr. pp. 41 and 42) asserts that a considerable portion of the equipment belongs to him, and the affidavits of Frank Enquist (Tr. p. 35) and J. W. Graham (Tr. p. 39) allege that the rest of the machinery was bought and paid for in full by the Christmas Hill Mining Company while they were officers of that corporation. Opposed to this are allegations in the complaint and in the affidavit of O. A. Ellis (Tr. p. 14) that the Christmas Hill Mining Company never had title thereto, and that all the equipment belonged to plaintiff by a transfer from the Ellis Mill Company (of which O. A. Ellis is secretary).

The affidavit of Frank Enquist (Tr. p. 37) fixes the value of the machinery, other than that owned by R. A. Murray, at $800.00. J. E. Knapp, a mining equipment dealer, fixes the total value, including the Murray equipment, at not to exceed $2135.70, provided the equipment should be fully reconditioned (Tr. p. 57). The affidavit of George Mather (Tr. p. 55), J. N. Ten Eyck (Tr. p. 54), R. A. Murray (Tr. p. 44) and Frank Enquist (Tr. p. 36) state that the machinery is inefficient, and as a practical mining matter, nearly worthless. They also state that like equipment or more efficient equipment could be bought at any time on the open market. The complaint of plaintiff alleges that "by reason of the facts precedingly stated the plaintiff is deprived of the use and benefit of her property of the value of $12,500.00 * * *." Other than in this statement, there is no allegation anywhere in plaintiff's affidavits and complaint as to what the value of the equipment is. There are some statements of the efficiency of the Ellis Mill, which is one of the pieces of the equipment, in the affidavits filed on behalf of plaintiff and appellant (Tr. pp. 17, 27, 29). The greater part of the appellant's affidavits, however, is devoted to unfounded scurrilous charges against appellees and the affiants for them.

Alleged proceedings by the Ellis Mill Company, whereby it is claimed the equipment was sold to plaintiff and appellant, are given to support plaintiff's claim of title (affidavit of O. A. Ellis, Tr. pp. 13-24). In view of the allegations in the affidavit of E. T. Robie, president of the Auburn Lumber Company

(Tr. pp. 31, 32) to the effect that the alleged transfer was collusive, in fraud of creditors of the Christmas Hill Mining Company, and was antedated in order to conceal its collusive nature, it is noteworthy that although alleged bill of sale (Tr. pp. 23, 24) is dated September 19, 1928, the acknowledgment thereon is dated April 19, 1929.

The allegation of Mr. Robie is corroborated by the statements of Messrs. Enquist (Tr. p. 35) and J. W. Graham (Tr. p. 39), that Unda Munoz had no dealings with the Christmas Hill Mining Company at the times claimed.

The affidavit of E. T. Robie (Tr. pp. 30 and 31) states what proceedings were had in the state court and the reasons therefor; which conflicts with the allegations of malice, oppression, etc. in plaintiff's complaint. That affidavit also sets forth (Tr. p. 31) that the claim made by Unda Munoz in the state court was a third party claim, and not a suit or affidavit in replevin, as inappropriately described by appellant.

The affidavit of W. N. Ten Eyck (Tr. p. 54) states that title to the machinery has never been determined at law, and that the appellees are solvent. These statements are not contradicted.

The affidavit of G. W. Seaton, deputy sheriff of Placer County (Tr. pp. 52 and 53) states what is actually under levy, being much less equipment than that described in plaintiff's complaint.

POINTS AND AUTHORITIES.

The points and authorities contained in the brief for plaintiff and appellant are frivolous and not worthy of discussion. They go no further than to state that an injunction may be granted in proper cases; that an appeal may be taken in proper cases; that a motion to dissolve a temporary restraining order before the return day on the plaintiff's motion for preliminary injunction must be noticed by defendant for at least two days.

THE MOTION FOR A TEMPORARY INJUNCTION WAS PROPERLY DENIED BY THE DISTRICT COURT.

The granting or the refusal of a preliminary injunction is in the sound discretion of the trial court, and its decision will not be reversed on appeal unless there has been an abuse of that discretion.

> "The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. Rahley v. Columbia Phonograph Co. 58 C. C. A. 639, 122 Fed. 623; Texas Traction Co. v. Barron, G. Collier, 115 C. C. A. 82, 195 Fed. 65, 66; Southern Exp. Co. v. Long, 120 C. C. A. 568, 202 Fed. 462; Amarillo v. Southwestern Teleg. & Teleph. Co. 165 C. C. A. 264, 253 Fed. 638."
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> *Meccano v. Wanamaker,* 253 U. S. 136, 40 Sup. Ct. Rep. 463; 64 L. Ed. 822, 826.

> "The well established rule in equity is that a preliminary injunction should not be granted in a doubtful case."
>
> *Anargyros & Co. v. Anargyros* (C. C. A. Ninth Circuit), 167 Fed. 753, 769, 93 C. C. A. 241.

In the present case there was a direct conflict of evidence on practically all points. It was doubtful under the conflicting evidence whether the jurisdictional amount would be provable at the trial of the action; it was very doubtful whether grounds of equitable jurisdiction could be proven at the trial. Under those conditions the District Court was entitled, if not required, to deny plaintiff's motion for a temporary injunction.

It was for that court to decide, and it did decide, that upon the showing made by plaintiff and defendants, plaintiff was not entitled to equitable relief pending the trial on the merits.

DEFENDANTS WERE NOT REQUIRED TO GIVE PLAINTIFF NOTICE OF THE HEARING OF HER OWN MOTION.

The temporary restraining order expired automatically upon the rendering of the decision that disposed of the motion for a preliminary injunction. This rule is practically self-evident.

> "The restraining order issued in the case was authorized by Sec. 718 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 580), which is as follows:
>
> " 'Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to

be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.' U. S. Rev. Stat. Sec. 718.

"Under this section, originally passed June 1, 1872, (Sec. 7, chapter 255, 17 Stat. at L. 196), a restraining order with features distinguishing it from an interlocutory injunction was introduced into the statutory law. In the prior act of Congress of March 2, 1793 (1 Stat. at L. 334, 335, chap. 22), it was provided in Sec. 6: 'Nor shall a writ of injunction be granted * * * in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.'

"By force of Sec. 718 a judge may grant a restraining order in case it appears to him there is danger of irreparable injury, to be in force 'until the decision upon the motion' for temporary injunction. Thus, by its terms, the section (718) does not deal with temporary injunctions, concerning which power is given in other sections of the statutes, but is intended to give power to preserve the status quo when there is danger of irreparable injury from delay in giving the notice required by equity rule 55, governing the issue of injunctions. While the statutory restraining order is a species of temporary injunction, it is only authorized, as Sec. 718 imports by its terms, until the pending motion for a temporary injunction can be heard and decided. Yuengling v. Johnson, 1 Hughes 607, Fed. Case No. 18, 185; Barstow v. Becket, 110 Fed. 826, 827; North American Land & Timber Co. v. Watkins, 48 C. C. A. 254, 109 Fed. 101, 106; Worth Mfg. Co. v. Bingham, 54 C. C. A. 119, 116 Fed. 785, 789.

"And the same view has been recognized in other jurisdictions having similar statutory provisions. 'A temporary restraining order is distinguished from an interlocutory injunction, in

> that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction, and its life ceases with the disposition of that motion and without further order of the court; while, as we have seen, an interlocutory injunction is usually granted until the coming in of the answer or until the final hearing of the cause, and stands as a binding restraint until rescinded by the further action of the court.' 1 High, Inj. 4th ed. Sec. 3."

This rule is also set forth in Judicial Code, Sec. 381, and in Equity Rule No. 73.

It is therefore apparent from the above provisions, the above decision and all other decisions passing upon the point, that the temporary restraining order falls of its own limitation upon the hearing of the temporary injunction, whether or not it is expressly mentioned in the order disposing of the motion; in fact, appellees are impelled to the belief that this appeal is sham and frivolous and taken only for the purpose of delaying the satisfaction of the judgment in the action of *Auburn Lumber Company v. Christmas Hill Mining Company.*

Wherefore, defendants and appellees pray that the order of the court below be affirmed, and that costs on appeal be taxed against appellant, together with such further penalty, for the taking of a frivolous appeal, as to the court seems meet and proper.

Dated, Auburn,
March 10, 1930.

Respectfully submitted,

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Orrin J. Lowell,
Attorneys for Appellees.